

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

MARCUS WASHINGTON	§	
v.	§	CIVIL ACTION NO. 9:07cv74 (Crim. No. 9:02cr32)
UNITED STATES OF AMERICA	§	

MEMORANDUM ADOPTING REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE
AND ENTERING FINAL JUDGMENT

The Movant Marcus Washington, proceeding *pro se*, filed this motion to vacate or correct his sentence under 28 U.S.C. §2255 complaining of the legality of his conviction and sentence. This Court ordered that the case be referred to the United States Magistrate Judge pursuant to 28 U.S.C. §636(b)(1) and (3) and the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges.

Washington was convicted in a jury trial of conspiracy to distribute and possession with the intent to distribute cocaine base, receiving a sentence of 262 months in prison. He took a direct appeal, and his sentence was affirmed by the Fifth Circuit; however, Washington's cert petition was granted by the Supreme Court, which remanded his case for further consideration in light of United States v. Booker, 543 U.S. 220, 125 S.Ct. 738 (2005).

On remand, the Fifth Circuit reviewed the imposition of the sentencing enhancements for plain error and decided that while plain error had been committed, Washington failed to show that the error affected his substantial rights; consequently, the Court reinstated the judgment affirming his conviction and sentence. United States v. Washington, 156 Fed.Appx. 625 (5th Cir., November 16, 2005) (not selected for publication in the Federal Reporter). Washington again sought certiorari, but was denied.

In his motion to vacate or correct sentence, Washington argued that: (1) the decision in Booker should be applied retroactively to protect his right to be sentenced only upon factors submitted to a jury for proof beyond a reasonable doubt; (2) he received ineffective assistance of counsel at sentencing when counsel failed to argue based on Apprendi v. New Jersey; (3) Washington is entitled to an evidentiary hearing; (4) counsel failed to interview and investigate potential witnesses; (5) the prosecutors “knew the truth of the case” but perpetrated a fraud on the court by offering perjured testimony; and (6) the district court erred by having counsel respond to Washington’s cert petition after the attorney had been released. The Magistrate Judge ordered the Government to respond to Washington’s petition, and an answer has been filed, to which Washington filed a reply.

After review of the pleadings and records in the case, the Magistrate Judge issued a Report on February 20, 2008, recommending that the motion to vacate or correct sentence be denied. The Magistrate Judge noted that Washington’s Booker claim had been raised and disposed of on direct appeal and he cannot revisit the determination by raising the same issue in a Section 2255 proceeding, that Washington failed to show that counsel was ineffective for failing to raise error under Apprendi v. New Jersey, 530 U.S. 466 (2000) because no such error occurred, that Washington is not entitled to an evidentiary hearing, counsel did not render ineffective assistance by failing to investigate, the prosecutors did not proffer perjured testimony, and the claim that the district court erred by having counsel respond to Washington’s cert petition after counsel was no longer on the case did not set out a claim of constitutional dimensions. Consequently, the Magistrate Judge concluded that Washington had not presented any claims upon which he was entitled to relief. The Magistrate Judge also recommended that Washington be denied a certificate of appealability *sua sponte*.

A copy of the Magistrate Judge’s Report was sent to Washington at his last known address, return receipt requested, but no objections have been received; accordingly, he is barred from *de novo* review by the district judge of those findings, conclusions, and recommendations and, except

upon grounds of plain error, from appellate review of the unobjected-to factual findings and legal conclusions accepted and adopted by the district court. Douglass v. United Services Automobile Association, 79 F.3d 1415, 1430 (5th Cir. 1996) (*en banc*).

The Court has carefully reviewed the pleadings and documents in this case, as well as the Report of the Magistrate Judge. Upon such review, the Court has concluded that the Report of the Magistrate Judge is correct. It is accordingly

ORDERED that the Report of the Magistrate Judge is hereby ADOPTED as the opinion of the District Court. It is further

ORDERED that the above-styled motion to vacate or correct sentence is hereby DISMISSED with prejudice. It is further

ORDERED that the Movant Marcus Washington is hereby denied a certificate of appealability *sua sponte*. Finally, it is

ORDERED that any and all motions which may be pending in this action are hereby DENIED.

So **ORDERED** and **SIGNED** this **19** day of **March, 2008**.



Ron Clark, United States District Judge